

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL DAVID PEREZ,

Petitioner,

vs.

LARRY SMALL, Warden,

Respondent.

No. C 09-0113 JSW (PR)

**ORDER TO SHOW CAUSE,
VACATING ORDER TO PAY FILING
FEE AND NOTICE TO ATTORNEY**

INTRODUCTION

Petitioner, a prisoner of the State of California, has filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 challenging the constitutional validity of his state court conviction. In an earlier order, this Court ordered Petitioner to pay the filing fee. However, due to an error in recording the payment, the Court was unaware that Petitioner had already paid the filing fee. Therefore, the Court's order to Petitioner to pay the fee within thirty days is vacated.

In the Court's earlier order, Petitioner's motion for counsel filed by *pro bono* attorney David J. Pullman was denied (docket no. 5). However, since Attorney Pullman has already made an appearance on this matter, he must inform the Court, by filing a motion to withdraw as counsel within ten days, if he does not intend to continue to appear on this matter *pro bono*. If he does not intend to withdraw as counsel for Petitioner, he need not file anything with the Court and he will continue as attorney of record for Petitioner. This order directs Respondent to show cause why the petition should not be

1 granted.

2 BACKGROUND

3 According to the petition, Petitioner was convicted of first degree murder, discharge
4 of a firearm and being a felon in possession of a firearm in San Francisco County Superior
5 Court in 2005. The trial court sentenced him to two terms of 25 years-to-life plus 2 years
6 in state prison. Petitioner's appeal to the California Court of Appeal was denied and his
7 petition for review in the California Supreme Court were denied in 2007. Petitioner later
8 filed a collateral challenge to his conviction in the California Supreme Court which was
9 denied in 2009. He filed the instant federal habeas petition in this Court on January 9,
10 2009.

11 DISCUSSION

12 I Standard of Review

13 This court may entertain a petition for a writ of habeas corpus "in behalf of a person
14 in custody pursuant to the judgment of a State court only on the ground that he is in
15 custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.
16 § 2254(a).

17 It shall "award the writ or issue an order directing the respondent to show cause
18 why the writ should not be granted, unless it appears from the application that the applicant
19 or person detained is not entitled thereto." *Id.* § 2243.

20 II Legal Claims

21 The petition raises the following ground for relief: 1) ineffective assistance of
22 counsel; and, (2) the trial court violated Petitioner's rights to due process and
23 confrontation by improperly limiting impeachment of a witness. Liberally construed, it
24 does not appear from the face of the petition that Petitioner is not entitled to relief on his
25 claims. Accordingly, Respondent is ordered to respond to the petition as set forth below.

26 CONCLUSION

27 For the foregoing reasons and for good cause shown,
28

1 1. The Clerk shall serve by certified mail a copy of this order and the petition, and
2 all attachments thereto, on Respondent and Respondent's attorney, the Attorney General of
3 the State of California. The Clerk also shall serve a copy of this order on Petitioner.

4 2. Respondent shall file with the Court and serve on Petitioner, within **sixty (60)**
5 days of the issuance of this order, an answer conforming in all respects to Rule 5 of the
6 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should
7 not be granted. Respondent shall file with the answer and serve on Petitioner a copy of all
8 portions of the state trial record that have been transcribed previously and that are relevant
9 to a determination of the issues presented by the petition. If Petitioner wishes to respond
10 to the answer, he shall do so by filing a traverse with the Court and serving it on
11 Respondent within **thirty (30)** days of the date the answer is filed.


12 3. Respondent may file a motion to dismiss on procedural grounds in lieu of an
13 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing
14 Section 2254 Cases. If Respondent files such a motion, Petitioner shall file with the Court
15 and serve on Respondent an opposition or statement of non-opposition within **thirty (30)**
16 days of the date the motion is filed, and Respondent shall file with the Court and serve on
17 Petitioner a reply within **fifteen (15)** days the date the opposition is filed.

18 4. It is Petitioner's responsibility to prosecute this case. Petitioner must keep
19 the Court informed of any change of address by filing a separate paper captioned "Notice
20 of Change of Address." He must comply with the Court's orders in a timely fashion.
21 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant
22 to Federal Rule of Civil Procedure 41(b).

23 This order terminates Docket No. 3.

24 IT IS SO ORDERED.

25 DATED: August 11, 2009

26 
27 _____
28 JEFFREY S. WHITE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL DAVID PEREZ,
Plaintiff,

Case Number: CV09-00113 JSW

CERTIFICATE OF SERVICE

v.

LARRY SMALL et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 11, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Michael David Perez
T90067
Calipatria State Prison
Calipatria, CA 92233

Dated: August 11, 2009



Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk